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No. 865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

LESLIE BROWN, BERNARD WEISS AND ALBERT WOHL, INDIVIDUALLY AND AS A PARTNERSHIP,

Petitioners,

vs.

THE UNAUTHORIZED PRACTICE OF LAW COMMITTEE OF CUYAHOGA, COUNTY, OHIO,

Respondent.

REPLY BRIEF OF PETITIONERS ON PETITION FOR A WRIT OF CERTIORARI

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Respondent's brief herein evokes a reply by brief under favor of Rule 24 (4) of the Revised Rules of the Supreme Court of the United States. Three matters are presented.

I. A Federal Constitutional question not apparent in the record prior to the judgment, review of which is sought is presented in timely manner to the court below by application for rehearing, whether or not considered by that court.

The record presented shows clearly that the decision of the Supreme Court of the State of Ohio (Appendix, pp. 62 and 63) for the first time in its opinion differentiated be-

tween laymen engaged in the representation of others on the basis of the form of the compensation received for the services said to be the practice of law. The third paragraph of the syllabus to the judgment of the Supreme Court of the State of Ohio shows that the said judgment, review of which is sought, affirmed the judgment of the Court of Appeals of Cuyahoga County, Ohio; but in this respect, the matter of fees, i. e., the mode of compensation of petitioners, an entirely new grounds of decision was injected. Viewed in the light of the complete originality of the question of method of compensation presented by the judgment of the Supreme Court of the State of Ohio, the fifth paragraph to the opinion in *Radio State W O W, Inc., et al. v. Johnson*, 326 U. S. 120, 89 L. Ed. 2092, as reported at 65 Supreme Court Reporter, p. 1475, which is cited by the respondent, becomes, by reason of respondent's reliance upon that authority, a confession that certiorari can be granted herein on the question of compensation, provided other considerations are adequately met. *Great Northern Railway Co. v. Sunburst Oil and Refining Co.*, 287 U. S. 358, as reported at 53 S. Ct. 145, held in the sixth paragraph of its syllabus:

> "Rule that constitutional question is urged too late for review by federal Supreme Court if raised for the first time on petition for rehearing below is inapplicable where grounds of original decision below supply new and unexpected basis for claim, by defeated party, of denial of federal right."

II. Jurisdictional defects, of which lack of capacity to sue is one, where incapable of being cured by amendment or by judgment, may be attacked, as it is said, "before trial, at trial, or, for the first time, on appeal." Defects so assailable are not protected by the general rule that a Federal Constitutional question is urged

too late if put forward for the first time upon a petition for rehearing.

In the case at bar the defect of lack of capacity to sue is that a Committee of thirteen lawyers was appointed by the Common Pleas Court to investigate the unauthorized practice of law. (Appendix, p. 30) After investigation, the committee concluded that the representation of claimants before agencies created by the Ohio Workmen's Compensation Law has constituted the practice of law from the beginnings of the Ohio Compensation system; that engagement in that business activity, when it is by persons not admitted to the practice of law constitutes the unauthorized practice of law. The thirteen lawyers, a committee, initiated a disciplinary proceeding against three laymen, petitioners before the Supreme Court of the United States. But they sought an injunction, which can only be had in Ohio in a civil action. Section 2727.01 of the Revised Code. The thirteen did not have, as a Committee, capacity to sue, nor did they have as individuals, except if action had been brought in a representative capacity for lawyers in general, or for claimants in general. But this was not done. There is no cure by judgment, for injunction is not a single judgment, once performed, concluded. Injunction is continuous in its operation and effect.

Lack of capacity to sue constitutes a bar to maintenance of an action. It could not have been cured by mere amendment. It was not cured by the judgment herein, and it is available to the petitioners herein now, for the first time on appeal, i. e. petition for a writ of certiorari. Lack of capacity to sue, by rendering the judgment thereby so defectively taken that it is a nullity, opens the way to attack by a direct proceeding, and authorizes and permits the Supreme Court of the United States to exercise its certiorari

jurisdiction herein, provided that the questions sought to be considered are questions raised by and within the Constitution of the United States.

III. The judgment sought to be reviewed cannot be considered to rest upon an adequate nonfederal ground, unless the nonfederal ground is independent of the denial of the Federal Constitutional right claimed and shown, particularly where the nonfederal ground claimed violates equally the state's constitutional insistence upon the equal protection of the laws.

In *Lynch v. New York*, 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191, Mr. Chief Justice Hughes stated the rule under consideration so well that it is repeated by Mr. Justice Frankfurter in his opinion in *Radio Station W O W, Inc. v. Johnson*, 326 U. S. 120, 129, 65 S. Ct. 1475, 1480, on which the respondent here relies. That statement is:

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, *or if it does not appear upon which of two grounds the judgment was based*, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."
>
> *Lynch v. New York*, 293 U. S. 52, 54, 55.
>
> (Italicized portion was omitted by Mr. Justice Frankfurter in his opinion in *W O W, Inc. v. Johnson, supra.*)

As Mr. Justice Frankfurter's opinion makes abundantly clear, the nonfederal ground claimed to be sufficient must, indeed, be so. In the judgment sought to be reviewed, respondent contends that "control over the practice of law by the various states" is the nonfederal ground. The words respondent would uphold are:

> "3. No person, other than an attorney in good standing, may hold himself out as being qualified to render service to those who may have claims for compensation arising under the Workmen's Compensation Laws of

Ohio or as being able to render services in the preparation and presentation of such claims nor may such person render such advice or services if a fee for such advice or services is to be received from or charged against the one having such claim." (Appendix, p. 58)

There is no ambiguity, no nonfederal ground separate from that which does violence to the American concept the equal protection of the laws. Representation of claimants before agencies created by the Workmen's Compensation Laws of the State of Ohio, if for fees paid by claimants upon a contingent basis, has been made the practice of law, unauthorized if done by persons not admitted to the practice of law, while the same acts, if done without compensation, or for compensation otherwise than by payment of contingent fees, as by salaried persons although not admitted to the practice of law, or by persons, although not admitted to the practice of law, who may represent employers, do not fall within the ban of being the unauthorized practice of law.

Moreover the adequate nonfederal ground violates equally the state's insistence, by its constitutional provision, Article II, Section 26 of the Constitution of the State of Ohio, upon the equal protection of the laws. Said provision is:

"All laws of a general nature shall have a uniform operation throughout the state; * * *"

In *Beachwood v. Board of Elections*, 167 O. S. 369, 372, 5 O. O. 2d 6, 148 N. E. 2d 921, it is said,

"This court has held many times that, to comply with this section, legislation need not affect every person in the state but that a reasonable classification may be made, and it is sufficient if the legislation operates equally upon every person and locality within such classification."

Thus "uniform operation" and "equal protection of the laws" impose the same standard. That which is claimed to be an adequate nonfederal ground violates both standards set, respectively, by the Constitution of the State of Ohio and the Constitution of the United States.

The prayer for the allowance of the writ of certiorari is renewed.

Respectfully submitted,

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